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No. 82-645

In The
Supreme Court of the United States

October Term, 1982

REPUBLIC NATIONAL LIFE INSURANCE COMPANY
and
AMERICAN LIFE PENSION HEALTH ASSOCIATES, INC.,
Petitioners,

v.

CALVIN C. SPARKS AND SUZANNE SPARKS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTIONS PRESENTED

1. Should this Court grant certiorari when the only claims raised by the Petitioners to challenge the jury verdict were waived below?

2. Should this Court review the decision of the highest court of Arizona holding that the insurance documents at issue gave rise to contract liability as a matter of state law?

3. Does the decision of the Arizona Supreme Court that jury instructions used in this case adequately instructed the jury on the tort of bad faith raise a substantial constitutional question which this Court should review?

4. Where, for the first time in a motion for rehearing of the Arizona Supreme Court's decision, Petitioners argued that reversal of the judgement against a subsidiary entity of one codefendant also necessarily required reversal of the punitive damage verdict against all defendants, but both state law and the evidence at the trial support the verdict as to the other codefendants, should this Court grant certiorari to review the decision?

5. Was the trial court's *in camera* review of Respondents' attorneys' fee agreement to assure the propriety of the attorneys' fee award under Arizona law a denial of due process to Petitioners?

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CALVIN C. SPARKS AND SUZANNE SPARKS

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Respondents, Calvin C. Sparks and Suzanne Sparks, husband and wife, pray that this court deny the petition for a writ of certiorari filed on October 13, 1982.

OPINION BELOW

The citation to the Opinion and Supplemental Opinion of the Supreme Court of the State of Arizona is *Calvin C. Sparks and Suzanne Sparks v. Republic National Life Insurance Company,* _____ Ariz. _____, 647 P.2d 1127 (1982).

STATUTES INVOLVED

In addition to the constitutional provision cited by Petitioners, this case involves Arizona Revised Statute § 12-341.01 and 28 U.S.C. § 1257 the relevant parts of which are set forth hereafter.

STATEMENT OF THE CASE

On September 4, 1980, eight jurors unanimously returned a verdict for compensatory and punitive damages against Petitioners because of their outrageous and tortious denial of insurance benefits on the basis of "patently ambiguous and previously undisclosed provisions in the insurance policy" ultimately issued to Calvin Sparks. *Sparks*, 647 P.2d at 1137. Calvin Sparks required continuing treatment arising from extensive brain damage and other injuries he had received in an airplane accident on May 1, 1977, and five-year old Kevin Sparks required continuing treatment of medical conditions arising from paraplegia sustained in the accident. Petitioners' termination of health insurance resulted in actual physical harm to Calvin and Kevin Sparks.

The health insurance policy had been purchased by Calvin to protect his family and the few employees of his small business, Sun Valley Sales & Air Conditioning. It was uncontradicted at trial that the only conversations concerning purchase of the insurance were between Calvin Sparks and Petitioners' agent, Robert Bowden. It was further uncontradicted that the only written information concerning the insurance Mr. Sparks saw before his premium check was accepted and the accident occurred was an eight-page brochure describing the insurance.

Mr. Sparks purchased the policy in reliance upon the brochure and oral statements of Robert Bowden, each of which unequivocally promised $250,000 per person coverage for medical care made necessary by an illness or accident sustained while the insurance was in force (irrespective of later termination of the insurance policy).

After purchase of the insurance but *prior* to delivery of the master policy to Mrs. Sparks, Calvin and Kevin Sparks were injured in the accident. Even if Mrs. Sparks had understood the ambiguous policy as meaning what Petitioners urged below, she could not have rejected it and bought different coverage at the time she received it since the catastrophic injuries had already been sustained by her husband and son.

Sun Valley Sales failed after the accident because permanent mental impairment rendered Mr. Sparks incapable of managing its affairs. The business was thus unable to continue premium payments for the insurance. Petitioners terminated all insurance benefits in December of 1977 claiming that the master policy provided that continuing benefits for a prior illness or accident were conditioned upon continuing premium payments.

The Sparks filed suit and proceeded to an eight-day trial in August, 1980 in the Maricopa County Superior Court. At the close of plaintiffs' case defendants moved for a directed verdict finding that they were not liable under the contract to pay continuing benefits to the Sparks. The trial court denied the directed verdict on the basis that the insurance documents obligated defendants to provide continuing benefits despite the ultimate nonpayment of premiums.

At the end of the *defendants'* case, the court directed a verdict for plaintiffs on the contract liability issue and, in part, instructed the jury that tort liability could be found if defendants had acted in bad faith by having "unreasonably with[held] payment of promised benefits" and denied the claims in a manner which was "not justified and reasonable under the circumstances." *Sparks*, 647 P.2d at 1136. The jury was also instructed that tort damages could be awarded if defendants had misrepresented the terms of the master policy in the brochure in violation of the Arizona Insurance Code.

Subsequent to return of the verdict, the trial court held an evidentiary hearing regarding plaintiffs' request for attorneys' fees pursuant to Arizona Revised Statutes § 12-341.01.1.[1] Plaintiffs were awarded $80,000 after the court determined, as required by the statute, that this amount *did not exceed* the amount that they had actually agreed to pay their counsel. To make this determination, the court reviewed the contingent fee agreement *in camera* after plaintiffs asserted the attorney-client privilege as to the particulars of the fee agreement. At the evidentiary hearing, however, the Sparks' counsel freely testified to the fact that the agreement was contingent and that the contingent fee would exceed the $80,000 which was awarded by the trial court.

Petitioners took their appeal after entry of judgment by the trial court. Petitioners raised six issues on appeal, all of which were carefully and accurately noted in the Opinion. 647 P.2d at 1132. The only federal question *ever* raised, either at trial or on appeal, was the Petitioners' contention that the trial court's *in camera* review of the contingent fee agreement somehow denied them due process in the award of attorneys' fees. Consistent with Petitioners' presentation of the issues, the Arizona Supreme Court did not address any other federal question in the Opinion issued June 10, 1982, affirming the judgment against Petitioners.

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[1] This statute provides, in part, as follows:

A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney's fees.

B. The award of reasonable attorney's fees awarded pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted, but such award may not exceed the amount paid or agreed to be paid.

On July 15, 1982, the Arizona Supreme Court issued a one paragraph Supplemental Opinion denying rehearing which simply held that the jury instruction on bad faith did not constitute reversible error and that the court did not sanction use of the precise language from the *Sparks* instruction as a model for future cases.[2]

After denial of the motion for rehearing, judgment on the mandate was entered by the superior court on July 21, 1982. Subsequently, Petitioners moved the Arizona Supreme Court to stay enforcement of the judgment pending filing of a petition for a writ of certiorari in the United States Supreme Court. The stay was denied by order dated July 22, 1982. Petitioners then sought a stay of enforcement of the judgment from this Court pursuant to 28 U.S.C. § 2101(f) (1982). This was denied by order of Justice Rehnquist on July 23, 1982. The judgment was then satisfied by Petitioners.

SUMMARY OF ARGUMENT

This case involves issues of contract interpretation and tort liability under Arizona law. No federal or constitutional issue which challenged the verdict was ever raised until the filing of the Petition and none actually exists. In effect, the Petitioners argue that the trial court and Arizona Supreme Court are so wrong in their rulings on jury instructions and other state law questions that their actions amount to arbitrary and capricious conduct, constituting a denial of due process of law under the Fourteenth Amendment. The claim borders on the frivolous. There is no federal question or other reason for this Court to review the Opinion of the Arizona Supreme Court.

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[2] The Supplemental Opinion thus assured amici that future bad faith defendants could request jury instructions containing exact language from the case of *Noble v. National American Life Insurance Company*, 128 Ariz. 188, 624 P.2d 866 (1981), which was decided *after* this case was tried; such language was not requested by defendants in this case when instructions were settled.

Respondents' argument, summarized, is as follows:

1. The three claims raised by Petitioners to challenge the verdict were waived below. There is no jurisdiction to consider these issues. Moreover, they could have no effect on the judgment because of the doctrine of adequate state grounds.

. The trial court did not *sua sponte* grant a directed verdict for plaintiffs at the close of plaintiffs' case in chief as Petitioners now claim. The trial court, rather, denied *defendants'* motion for a directed verdict on the question of contract liability and, in the course of explaining its ruling, outlined its interpretation of the contractual documents, which is a decision for the court under Arizona law. The Arizona Supreme Court correctly affirmed the trial court's ruling that petitioners were liable under their insurance contract as a matter of state law. No legitimate federal or constitutional issue is raised by Petitioner's claim.

3. The Opinion of the Arizona Supreme Court is a carefully researched and thorough exposition of Arizona law on the tort of bad faith. The refusal of the Arizona Supreme Court to determine that the bad faith jury instruction was reversible error under Arizona law was not arbitrary and capricious state action denying Petitioners their Fourteenth Amendment rights.

4. The reversal of the verdict as to defendant Planned Security Trust ("PST") raises no constitutional question as to the verdict against Petitioners. PST was a subsidiary entity of Petitioner ALPHA with no purpose other than to hold Republic's insurance policy. PST could undertake no action without direction from ALPHA. There was no evidence of any financial worth of PST. Inclusion of PST as a jointly-liable party in the jury's consideration of damages could have had no improper effect on the verdict so as to require a reversal for Republic and ALPHA under common law principles.

5. The trial court's *in camera* review of the attorneys' fee agreement did not deprive Petitioners of their due process rights in connection with the $80,000 attorneys' fee award. The fee agreement was not substantively considered by the court in determining its award; Petitioners were fully allowed to cross-examine witnesses with regard to the germane considerations under the statutory provision authorizing the fee award. This is the only federal claim preserved below, but there is no special and important reason to consider it, nor does it meet the enumerated criteria for granting certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Petitioners Failed to Preserve Federal Question Jurisdiction Over the Claims Which Seek to Attack the Verdict.

The three constitutional "issues" raised by Petitioners as reasons for this Court to review the verdict were waived at *both* the trial and appellate levels of the state court proceedings. It is settled Arizona law that "[t]he failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue." *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977); *Goldwaters Inc. v. Medar*, 82 Ariz. 344, 313 P.2d 410 (1957). The only federal question preserved in the state proceedings concerned the award of attorneys' fees.

Contrary to Petitioners' assertion, no issue on appeal was ever advanced that error had been committed by the supposed *"sua sponte"* grant of a directed verdict on contract liability for the plaintiffs at the close of their case. Though the Petitioners commented on this twice in their opening appellate brief it was never framed as an issue or mentioned as a due process question. Similarly, though Petitioners argued on appeal that the bad faith instruction given to the jury was improper under the subsequent Arizona Supreme Court opinion in *Noble v. National American*, *supra*, their argument was framed solely in

terms of state law. Petitioners implicitly concede that they never argued below that the jury instruction given by the trial court, and affirmed by the Arizona Supreme Court, denied them due process. (Petition at 5).

Finally, though they argued that the three defendants were not jointly and severally liable, Petitioners never argued prior to their motion for rehearing that a reversal as to one or more defendants on the joint and several liability question should entail modification or reversal of the damage awards against the remaining defendants. (Appellants' Opening Brief at 35-38). Consistent with Arizona waiver rules, this issue also falls under the settled rule that an "attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

None of these waived "federal questions" seeking to challenge the verdict arose from a ruling of the Arizona Supreme Court which could not have been anticipated prior to the motion for rehearing. *Herndon, supra.*

Because no federal question was preserved below which questions the jury verdict, this Court is without jurisdiction to review its affirmance. 28 U.S.C. § 1257(3) (1982);[3] *Webb v. Webb*, 451 U.S. 493 (1981); *Herndon v. Georgia, supra; Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

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[3] This provision provides as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

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(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Even if a federal question gave this Court jurisdiction of this case, these "federal questions" could not alter the verdict in any event since the waiver below is binding and constitutes an adequate state ground of decision. *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7, (1978); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Finally, even if not waived, the issues raised by Petitioners challenging the verdict fail to meet the criteria for granting certiorari and present no special and important reasons to grant the writ, as will be demonstrated. Sup. Ct. R. 17.

II. The Determination of Contract Liability Under Arizona Law Does Not Merit Review By This Court Under the Fourteenth Amendment.

Petitioners' theory that the trial court directed a verdict before the defendants presented their evidence is without basis in fact. The transcript confirms that the trial court's comments on the contract liability issues were simply to indicate the court's interpretation of the contractual documents; they did not constitute a directed verdict for the plaintiffs at the close of plaintiffs' case.[4] Defendants had moved for a directed verdict arguing that the master policy justified their termination of benefits. The court rejected this because it found that the contractual documents provided for *continuing* benefits. The trial court's ultimate directed verdict for plaintiffs on contract liability was granted *at the close of defendants' case*.

In its Opinion, the Arizona Supreme Court also held that Petitioners were liable under the insurance contract documents as a matter of law.

Petitioners admit that they did not seek leave to introduce *any* evidence on the "liability point already decided by the trial judge." (Petition at 10 n. 5). Under Arizona law defendants' failure to object to the supposed directed ver-

[4] The complete discussion in chambers on this question is set forth in the Appendix at 1a-4a.

dict prior to the close of their case or to make an offer of proof of that evidence which they would have sought to introduce on the question is a binding waiver of the objection. Ariz. R. of Evid. 103.[5] *See Montano v. Scottsdale Baptist Hospital, Inc.*, 119 Ariz. 448, 581 P.2d 682 (1978).

Petitioners finally assert that it was "only" because of the understanding of Suzanne Sparks of the insurance coverage that the Arizona Supreme Court reached its conclusion as to how an "ordinary person" would have understood the insurance. The only evidence Petitioners now claim they would have sought to introduce would not go to Mr. Sparks's insurance contract but, rather, only to what "ordinary" people would think the master policy means. (Petition at 10). Petitioners assert that the right which they allegedly lost, but never sought, was their right to have called a parade of lay people to testify as to how they would have interpreted the master contract.[6] The Opinion's discussion of how an ordinary person would have construed the insurance policy language was only illustrative of the court's legal conclusions as to the interpretation of the contractual language. The court obviously cited Suzanne Sparks' testimony only to exemplify this point. Given the

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[5] Rule 103 provides, in part, as follows:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

[6] Defendants listed no such witnesses in their pretrial statement and thus waived their right to call them. Rule VI(a) of the Uniform Rules of Practice of the Superior Court of Arizona in part provides "[n]o other exhibits or witnesses shall be used during the trial other than those listed and exchanged, except for good cause shown."

fact that Calvin Sparks alone decided to purchase the insurance, debate among "ordinary" people as to the meaning of the master policy would have been irrelevant.

Under Arizona law, questions of contract interpretation are questions of law which are for the court to decide. *C & T Land & Development Co. v. Bushnell*, 106 Ariz. 21, 470 P.2d 102 (1970); *Kintner v. Wolfe*, 102 Ariz. 164, 426 P.2d 798 (1967). Thus, even if the court had ruled for plaintiffs on the issue of contract liability under the documents at the close of plaintiffs' case, such a ruling would have been correct or, at most, would constitute harmless error. Ariz. R. of Civ. P. 61.[7] Given the court's power to interpret contractual documents as a matter of law, and the uncontradicted evidence, any ruling by the trial court on the terms of the contract could be overturned by this Court only upon a finding that the trial court and Arizona Supreme Court misapplied and misinterpreted Arizona law.

III. No Constitutional Issues Arise From the Arizona Supreme Court's Affirmance of the Jury Instructions Given By the Trial Court.

A. The *Sparks* Jury Instructions On Bad Faith Did Not Deny Petitioners Due Process.

In a novel attempt to circumvent the law precluding review by this Court of state decisions based on matters exclusively concerning state law, Petitioners seek to have this Court review the Arizona Supreme Court's approval of the bad faith instruction under Arizona law on the basis

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[7] Rule 61 is identical to Rule 61 of the Federal Rules of Civil Procedure and provides as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

that it was so arbitrary and capricious as to amount to a denial of due process. This issue was never preserved below nor was it even raised in the motion for rehearing.[8] This Court would be flooded with petitions for certiorari if it gave credence to Petitioners' novel claim. Disgruntled state court litigants could characterize every adverse state opinion as presenting such a "federal question."

In its Opinion, the Arizona Supreme Court carefully assessed the jury instructions and found that they were "adequate in informing the jury" as to the correct rule of law. 647 P.2d at 1136. In its Supplemental Opinion the court merely indicated that the specific language of the *Sparks* instructions should not be used as a model for future cases, but rather, that precise language from the intervening decision in *Noble v. National American, supra,* be included if properly requested. 647 P.2d at 1144.

The instructions were carefully reviewed twice by the Arizona Supreme Court and found to have been proper, even if not so perfect that future cases should use them verbatim. As such, the instructions adversely affected no substantial right of Petitioners' and, at most, constituted harmless error which would not justify reversal of the verdict. Ariz. R. of Civ. P. 61; *Palmer v. Hoffman,* 318 U.S. 109, 116 (1943). *See also, Alloy International Co. v. Hoover-NSK Bearing Co.,* 635 F.2d 1222 (7th Cir. 1980).

Petitioners assert that the *Sparks* Opinion somehow violates established Arizona retroactivity principles regarding common law decisions of the state's appellate courts. On the contrary, the court carefully weighed the instructions against the standards adopted in Noble, *supra* and found

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[8] Even a seemingly clear case of an arbitrary and capricious result by a state's highest court will not justify certiorari where the federal question was not preserved below. *See Estate of Wilson v. Aiken Indus., Inc.,* 439 U.S. 977 (1978) (Blackmun, J., concurring).

the instructions adequate in informing the jury as to the correct rules of law. Development of common law is a progressive process. The *Sparks* decision is merely a further refinement of the Arizona law of bad faith.

Petitioners for the first time now cast their argument in due process terms as the only way to even attempt to argue that this Court should review a question which is exclusively one of state law.

B. Affirmance of the Damage Award Was Proper Despite the Reversal as to Defendant Planned Security Trust.

Any issue regarding the constitutional implications of a reversal as to less than all defendants was also waived below since it was neither raised at the trial level nor before decision of the appeal. (Petition at 8 n. 4). Since Petitioners did raise the joint and several liability issue on appeal seeking reversal *as to one or more* of the defendants, it can hardly be said that the effect of a reversal as to less than all of the defendants on the damage award against the remaining defendants was so "unanticipated" as to require relief for Petitioners before this Court from their waiver of the issue. *Herndon v. Georgia, supra* at 443-444.

Petitioners' argument here is premised on *Washington Gas-Light Co. v. Lansden*, 172 U.S. 534 (1899), which is cited for the proposition that due process principles necessarily mandate reversal of a punitive damage award against joint tortfeasors when one of the tortfeasors is ultimately held not liable. The holding in *Washington Gas-Light Co.*, however, was decided as a matter of *common law* and not

as a principle of constitutional *due process.*[9] None of the subsequent cases citing *Washington Gas-Light* has referred to its holding as being premised on the due process clause.

Cases similar to *Washington Gas-Light* have reversed because the financial worth or nature of the tortious conduct of the improperly included defendant could have improperly impacted on the size of the punitive damage verdict against the remaining defendants. *Washington Gas-Light, supra; Landseidel v. Culeman,* 47 N.D. 275, 181 N.W. 593 (1921). Where there is no such effect, however, reversal is improper. *Constitution Publishing Co. v. Dale,* 164 F.2d 210 (5th Cir. 1947).

The "Agreement and Declaration of Trust" between defendant ALPHA and the First National Bank of Jackson, Mississippi, creating the "Planned Security Trust" (Appendix 5-A to 13-A) reveals that PST was a mere "dry trust" which could take *no* independent action of *any* significance without the express approval of ALPHA. PST was directed to obtain a policy from Republic only on terms specified by ALPHA (App. 5-A, Art. II, § 1). ALPHA totally indemnified the trustee from all liability and any such liability was to be solely that of ALPHA (App. 6-A, 7-A, Art. II, §§ 5, 6). ALPHA was to totally administer all aspects of the insurance and trust and the trustee was given no independent powers. (App. 7-A, Art. IV, § 1; App. 10-A,

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[9] *Washington Gas-Light* was brought in the Supreme Court of the District of Columbia, which at that time exercised the powers of both a local and federal court of original jurisdiction. Act of February 9, 1893, Chapter 74, 27 Stat. 434; Act of March 3, 1863, Chapter 91, 12 Stat. 762. The Court was "[e]ssentially a local court . . . which adjudicated controversies of the type generally addressed in the state courts." Voorhees, *The District of Columbia Courts: A Judicial Anomaly,* 29 Cath. U.L. Rev., 917, 924-925 (1980). The opinion of the Court of Appeals of the District of Columbia (reported at 9 App. D.C. 508), and the United States Supreme Court discuss common law principles and make no mention of constitutional due process.

Art. VIII, § 4) It is thus obvious that the trust was established only as a matter of convenience to hold the policy and that it had no independent legal significance apart from defendants ALPHA and Republic.

Appendix 14-A to 33-A quotes every reference to PST made in the presence of the jury; it confirms that the only discussion and evidence regarding PST was illustrative and foundational to an understanding of the insurance relationship between the Sparks family and defendants ALPHA and Republic. PST was simply "a mechanism" for the insurance and "incapable of exercising any control or taking part in any concerted action toward the plaintiffs." *Sparks*, 647 P.2d at 1138. There was *no* evidence or discussion of any financial worth or conduct of PST before the jury. Even if such evidence had been introduced, it would have been properly considered in determining damages against Republic and ALPHA, since ALPHA controlled the trust's assets and directed its conduct.[10]

The verdict against Alpha and Republic was proper since there is absolutely no basis for assuming the verdict was improperly influenced by the inclusion of PST.[11] The result in *Sparks* is consistent both with *Constitution Publishing, supra*, and prior Arizona case law affirming a joint punitive damage verdict against one defendant even though a codefendant obtained a reversal. *Rogers v. Bryan*, 82 Ariz. 143, 309 P.2d 773 (1957).

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[10] Respondents submit that the judgment against PST was proper because the trust was a legal entity which issued the policy in its own name. Acts of Republic and ALPHA on behalf of PST would therefore be a liability of the trust on joint venture or agency principles.

[11] Petitioners posit that the "assumption is inescapable that the jury roughly assessed one million dollars per defendant." (Petition at 14 n. 9). This assertion is wholly conjectural. If anything the conclusion is inescapable that the jury decided to award punitive damages in twice the amount of the compensatory damages.

For Petitioners to suggest that ALPHA and Republic should obtain a reversal because of the reversal as to PST is to suggest that Petitioners should escape a just verdict simply because they used the artifice of a trust as the conduit of their joint venture.

IV. Petitioners Were Not Denied Due Process of Law By the Court's *In Camera* Review of Respondents' Attorney Fee Agreement.

The *only* constitutional issue which was raised below concerned the trial court's award of $80,000 in attorneys' fees to Respondents. Respondents' request for statutory attorneys' fees pursuant to Arizona Revised Statute § 12-341.01 required a finding by the court that the amount of attorneys' fees awarded did "not exceed the amount paid or agreed to be paid." The court reviewed the fee agreement *in camera* and determined that the amount of attorneys' fees requested was in fact less than the statutory limit.

At the evidentiary hearing Petitioners were allowed to cross-examine Respondents' counsel to establish both that the fee agreement was contingent and that the potential percentage of the contingent fee exceeded the requested fees. The fact that counsel for Petitioners did not know the exact contingent percentage could have had no conceivable bearing on the question. The trial court's *in camera* inspection of the fee agreement posed no imaginable risk of error; Petitioner's examination of the fee agreement would have been of no additional value as a procedural safeguard.

Petitioners cite cases which held that the substantive use of evidence for rate-making purposes which was neither of record nor available to utilities denied them federal due process. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *Interstate Commerce Commission v. Louisville and Nashville R.R. Co.*, 227 U.S. 88 (1913). In those cases the Court was particularly concerned that the evidence was not available to it, or any appellate court, so that it could "test the sufficiency of the facts that support the finding." *Louisville and Nashville,*

supra, 27 U.S. at 93. In this case, however, *the trial judge did not use the fee agreement as substantive evidence in determining the size of the award but only to ensure that the award did not exceed the limit set by the statute.* The amount of the court's fee award was to approximate an appropriate non-contingent fee determined from expert testimony and time records of Respondents' counsel. The fee agreement is under seal in the court file and is available for inspection by the appellate courts.

That the courts are the ultimate arbiters of privilege claims asserted against requests for production of documentary evidence is clear from *U.S. v. Nixon*, 418 U.S. 683 (1974). *In camera* review allows the court to measure a claim of privilege without first providing all material to the subpoenaing party. Utilizing *in camera* review, the court can protect the rights of all parties. Due process does not necessarily require independent review by the adverse party.[12] Disclosure of the actual fee agreement would have served no purpose in this case.

There is no special and important reason to review the attorneys' fees ruling, the only asserted constitutional issue raised and decided below. The issue meets none of the enumerated criteria for granting certiorari. Sup. Ct. R. 17.

CONCLUSION

The trial court, after verdict by jury, awarded a judgment based upon the contract between the parties and upon the outrageous and tortious conduct of the defendants. That judgment and verdict were based upon Arizona contract

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[12] Even in a criminal context, *in camera* inspection of privileged materials has been found proper as "a practice which is both reasonable and protective of defendant's rights." *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). A defendant's due process rights are not violated by a court's *in camera* review of non-substantive evidence, *United States v. Lyons*, 567 F.2d 777 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); *United States v. Chacon*, 564 F.2d 1373 (9th Cir. 1977), even if the court hears testimony when the defendant is not present. *United States v. Lyons, supra.*

and tort law. The Arizona Supreme Court, the highest authority on Arizona law, upheld that judgment. Petitioners seek to have the decision reviewed once more by now alleging "federal issues" under the Fourteenth Amendment. Such "issues" are no more present in this case than in any state court adjudication in which motions were granted and jury instructions given. Such "issues" present no special and important reasons for review by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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